No. 93-21

(2)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

MS. B.,

Petitioner,

v.

MONTGOMERY COUNTY EMERGENCY SERVICE, INC., DR. K. ASHALATHA REDDY AND ROBERT BOND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Is the record-bound question whether a genuine issue of material fact exists a special and important reason for this Court to exercise its discretion, under Supreme Court Rule 10, and grant the Petition for Writ of Certiorari?

II. Does the court of appeals' disposition of Ms. B's substantive due process claim follow this Court's precedent?

III. Is the court of appeals' disposition of Ms. B's substantive due process claim consistent with sister courts of appeals decisions?

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CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Respondents correct here misstatements made in corresponding section of Ms. B's Petition for Writ of Certiorari. First, the Opinion of the United States District Court for the Eastern District of Pennsylvania, captioned *Ms. B v. Montgomery County Emergency Service, Inc.*, 799 F.Supp. 534 (E.D.Pa. 1992), *aff'd mem. sub nom. Ms. B. v. The United States Postal Service*, 989 F.2d 488 (3d Cir. 1993), is attached to Ms. B's Petition as Appendix "A" and not, as Ms. B. represents, Appendix "B". Second, the district court Opinion, captioned *Ms. B v. Montgomery County Emergency Service, Inc., et al.*, was published in the *Federal Supplement* at 799 F.Supp. 534 (E.D.Pa. 1992), and is not, as Ms. B. represents, "an unpublished written opinion." (Ms. B's Petition at 1).

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RESPONDENTS' BRIEF IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions involved include the Due Process Clause of the Fourteenth Amendment, 42 U.S.C. §1983, and 55 Pa.Code §5100.32(9).

The Due Process Clause of the Fourteenth Amendment states the following:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law. . . .

U.S. Const. Amdt. 14.

Section 1983, 42 U.S.C. §1983, states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable for the party injured in an action at law, suit in equity, or other proper proceeding or redress. . . .

42 U.S.C. §1983.

The nonconsensual release of information provision, at 55 Pa.Code §5100.32(a)(9), states the following:

> **§5100.32. Nonconsensual release of information.**
>
> (a) Records concerning persons receiving or having received treatment shall be kept confidential and shall not be released, nor their content disclosed without the consent of a person given under §5100.34 (relating to consensual release to third persons), except that relevant portions or summaries may be released or copied as follows:
>
> (9) In response to an emergency medical situation when release of information is necessary to prevent serious risk of bodily harm or death. Only specific information pertinent to the relief of the emergency may be released on a nonconsensual basis. . . .

55 Pa.Code §5100.32(a)(9).

COUNTERSTATEMENT OF THE CASE

The district court Opinion, authored by the Honorable Louis H. Pollak, adequately sets forth this case's factual background. Respondents incorporate by reference Judge Pollak's factual recitation. *Ms. B v. Montgomery County Emergency Service, Inc.*, 799 F.Supp. 534, 535 (E.D.Pa. 1992), *aff'd mem. sub nom. Ms. B. v. The United States Postal Service*, 989 F.2d 488 (3d Cir. 1993).

Ms. B's Petition errs in claiming that the United States District Court for the Eastern District of Pennsylvania had jurisdiction over this case under 42 U.S.C. §1983. Section 1983 is a civil rights, not a jurisdictional, statute. The district court possessed jurisdiction over this matter by virtue of 28 U.S.C. §1331 ("The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

REASONS FOR DENYING THE WRIT

This case is unworthy of certiorari for the following reasons. First, whether a genuine issue of material fact precludes summary judgment is wholly unimportant under Rule 10. This Court will not grant certiorari to review a decision that solely turns upon an analysis of facts or to determine whether the evidence supports a judgment. With respect to these issues, courts of appeals are generally the courts of last resort.

Second, assuming that Respondents violated the Commonwealth of Pennsylvania's Mental Health Procedures Act, Act of July 9, 1976, P.L. 817, *as amended*, 50 P.S. §§7101 *et seq.* ("MHPA"), this Court's precedent establishes conclusively that a mere state statutory violation is not actionable under §1983 as a substantive due process offense. Section 1983 provides a citizen with an effective remedy against abuses of *state* power that violate *federal* law. Neither §1983 nor the United States Constitution provides a remedy for alleged abuses that,

as here, do *not* violate federal law. A violation of state law, standing alone, does not constitute a denial of substantive due process. The court of appeals decision here therefore comports rather than conflicts with Supreme Court precedent.

Third, the court of appeals' holding – that, assuming Respondents violated the MHPA, a state statutory violation is not actionable under §1983 as a substantive due process offense – is consistent with the overwhelming majority of courts of appeals decisions. The First, Third, Fifth, Sixth, Seventh and Eighth Circuit Courts of Appeals have ruled that violations of state law – even when arbitrary, capricious or undertaken in bad faith – do not, without more, give rise to a denial of substantive due process under the United States Constitution.

I. Assuming A Genuine Issue Of Material Fact Exists Barring Summary Judgment, Certiorari Should Not Be Granted On The Basis Of This Record-Bound Factual Issue

Ms. B's first question presented for review – whether the district court erred in granting summary judgment given the existence of a genuine issue of material fact – ignores the weighty considerations governing the exercise of this Court's discretion under Supreme Court Rule 10. "A Petition for a writ of certiorari will be granted only when there are *special* and *important* reasons therefore. Supreme Court Rule 10.1 (emphasis added). Such "important" reasons include conflicts between a court of appeals and 1) another court of appeals; 2) a state court of last resort (involving federal question); and 3) this Court's applicable decisions. Supreme Court Rule 10.1(a) and (c).

Ms. B's Petition does not assert any "important" or weighty reasons for this Court to grant certiorari. (That is because no such reasons exist). Instead, raising

record-sensitive factual issue under the summary judgment standard, the Petition improperly treats this Court like a super-court of appeals.

This Court has consistently held that it does not "grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). With respect to these record-sensitive issues, the courts of appeals, and not this Court, are generally courts of last resort.

Even assuming the existence of a genuine issue of material fact – and no such dispute exists here – this fact-based or record-sensitive issue is neither "special" nor "important" and, therefore, is irrelevant.

II. Assuming Respondents Violated The MHPA, A Mere State Statutory Violation Does Not, Standing Alone, Offend The Substantive Due Process Component Of The Due Process Clause Of The United States Constitution

To prevail in a §1983 action, one must establish that the conduct complained of was 1) committed by a person acting under color of state law and 2) deprived a person of rights, privileges or immunities secured by the Constitution and the laws of the United States. *Collins v. City of Harker Heights*, ___ U.S. ___, 112 S.Ct. 1061, 1065, 117 L.Ed.2d 261 (1992). Rights Respondents' allegedly infringed – a privacy right to confidential medical records and information – is encompassed within "liberty" substantively protected by the Fourteenth Amendment's Due Process Clause. *Whalen v. Roe*, 429 U.S. 589 (1977) (constitutionally protected right to confidentiality); *Scheetz v. The Morning Call*, 946 F.2d 202, 206 (3d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1171, 117 L.Ed.2d 417 (1992) ("We have recognized that some confidential information, such as medical records, is constitutionally protected under the confidentiality branch of the federal privacy right."); and *United States v. Westinghouse Elec. Corp.*,

638 F.2d 570, 577 (3d Cir. 1980) ("There should be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.") (footnote omitted).

Ms. B asserts that Respondents violated her right to substantive due process under the Fourteenth Amendment "by virtue of Respondent's [sic] unconsented disclosure of confidential and privileged information in violation of Section 7111 of the Mental Health Procedure [sic] Act and the Pennsylvania Constitution." (Petition at i). The question then, as framed by Ms. B, is whether §1983 provides a remedy against alleged abuses of state power that violate state, as opposed to federal, law. The answer, in short, is "No."

It is well-settled that §1983 does *not* provide a remedy for state power abuses that merely violate state law. *Collins*, ___ U.S. at ___, 112 S.Ct. at 1065 (1992) ("Although the statute provides the citizen with an effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law. . . ."); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989) ("[T]he claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation."); *Baker v. McCollan*, 443 U.S. 137, 146-47 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort law principles."); *Bishop v. Wood*, 426 U.S. 341, 350 (1976) ("The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.").

Section 1983 does *not* provide a remedy for state power abuses that offend state law. Ms. B, however, improperly seeks relief under §1983 for alleged abuses

of state power in violation, not of federal law, but of state statute. The court of appeals, in affirming the district court's well-reasoned Opinion, therefore followed, rather than substantially departed from, Supreme Court precedent. *Cf. McKinney v. Pate*, 985 F.2d 1502, 1507-15 (11th Cir. 1993) (Tjoflat C.J., specially concurring opinion criticizing Eleventh Circuit's divergence from Supreme Court substantive due process jurisprudence), *reh'g granted*, 994 F.2d 772 (11th Cir. 1993).

The Petition does not allege any divergence between this Court's and the court of appeals' substantive due process jurisprudence because none exists. The court of appeals, following this Court's pronouncements, properly resisted Ms. B's transparent attempt to federalize an alleged state statutory violation.

The Petition also does not assert that the Third Circuit's decision conflicts with sister courts of appeals decisions. The overwhelming weight of authority among the courts of appeals is that a mere state statutory violation does not offend substantive due process. The question whether Respondents violated Ms. B's *federal* constitutional right to privacy is therefore distinct from whether Respondents violated a state statute; namely, the MHPA. *Scheetz*, 946 F.2d at 206-07 (3d Cir. 1991) ("We note that the question of whether a federal constitutional right of privacy has been violated is a distinct question from whether a federal statutory right to privacy . . . or a state common law right to privacy has been violated."); *Coyne v. City of Somerville*, 972 F.2d 440, 443-44 (1st Cir. 1992) ("It is bedrock law in this circuit, however, that violations of state law – even where arbitrary, capricious, or undertaken in bad faith – do not, without more, give rise to a denial of substantive due process under the U.S. Constitution.") (footnote omitted). *Evans v. City of Marlin*, 986 F.2d 104, 108 n.6 (5th Cir. 1993) ("The failure to follow procedural guidelines, standing alone, does not implicate constitutional liability."); *Smith v. City of Picayune*, 795 F.2d 482, 487 (5th Cir. 1986) ("Although the City did not conform to

state law in zoning the property, that violation of state law does not *per se* constitute denial of the federal constitutional right to equal protection of law."); *Holthaus v. Board of Education, Cincinnati Public Schools*, 986 F.2d 1044, 1046 (6th Cir. 1993) (discharge of high school football coach for allegedly improper racial remark did not violate coach's substantive due process rights); *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989) ("A state ought to follow its law, but to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law. State rather than federal courts are the appropriate institutions to enforce state rules."); and *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992) ("[W]e have unequivocally held that a state-law error, no matter how fundamental, cannot in and of itself create a federal due process violation.").

In light of the above overwhelming authority, the court of appeals decision does not, by any stretch of the imagination, conflict with other courts of appeals decisions.

Accordingly, no special and important reasons exist for the granting of certiorari.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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